

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Eighteenth Region

TYSON FRESH MEATS, INC.

Employer

and

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 440

Petitioner

Case 18-RC-17284

DECISION AND DIRECTION OF ELECTION

Petitioner seeks to represent a unit of production employees engaged in the slaughter, processing, packaging and shipping of pork products. The Employer contends that the proposed unit is inappropriate in that it excludes maintenance employees engaged in the upkeep of its facility and equipment. Based on the record and the relevant Board cases, I find that a combined production and maintenance unit is the minimally appropriate unit.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.¹

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The first part of this decision reviews the well-established principles for judging the appropriateness of separating production from maintenance employees. I will then explain why the maintenance employees lack a separate community of interest and must be included in the unit.

Legal Standards

Pursuant to Section 9(b) of the Act, the Board "shall decide in each case whether . . . the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." More than one unit may be appropriate in any situation – a union is "not required to request representation in the most comprehensive or largest unit of employees of an employer unless 'an appropriate unit compatible with the requested unit does not exist.'" Overnite Transportation Co.,

¹ The Employer, Tyson Fresh Meats, Inc., is a Delaware corporation with a facility located in Storm Lake, Iowa, where it is engaged in the operation of a port slaughter and cut plant. During the past twelve months, a representative period, the Employer purchased goods and materials for its Storm Lake, Iowa facility valued in excess of \$50,000 from suppliers located outside the state of Iowa. During the same period, the Employer sold products and materials valued in excess of \$50,000 directly to customers located outside the state of Iowa.

322 NLRB 723, 723 (1996) (quoting P. Ballantine & Sons, 141 NLRB 1103, 1107 (1963)).

Production and maintenance employees together may be the most common unit in the industrial setting. The Board has long held that a production and maintenance employee unit is presumptively appropriate. See, e.g., Appliance Supply Company, 127 NLRB 319, 321 (1960). A unit limited to production employees and excluding maintenance employees may be appropriate in limited circumstances. Lawson Mardon U.S.A., Inc., 332 NLRB 1282 (2000), citing Capri-Sun, Inc., 330 NLRB 1124 (2000). Maintenance departments may only be separated from production departments "where the facts of the case demonstrate that the maintenance employees involved have the requisite community of interest." Ore-Ida Foods, Inc., 313 NLRB 1016, 1019 (1994) (citing American Cyanamid Co., 131 NLRB 909 (1961)). In determining whether there is a "requisite community of interest," the Board seeks to determine whether maintenance employees "are a separately identifiable group performing similar functions and having a community of interest separate from production and having a community of interest such as would warrant separate representation." U.S. Plywood-Champion Papers, 174 NLRB 292, 296 (1969). Resolution of this issue depends on a case-by-case analysis of "mutuality of interests in wages, hours, and other working conditions; commonality of supervision; degree of skill and common functions; frequency of contact and interchange with other employees; and functional integration." Ore-Ida Foods, 313 NLRB at 1019. Thus, the threshold question is whether a disputed group of maintenance employees could constitute a separate appropriate unit and not, as the Petitioner contends in its post-hearing brief, whether the maintenance employees share

an “overwhelming community of interest” with the production employees. If that question is answered in the negative, the Board includes the production and maintenance employees in the same unit. U.S. Plywood, 174 NLRB at 296.

Background Facts; the Employer's Operation

The Employer operates a hog processing operation. Simplified, its operation is divided into two sections – killing and cutting. The killing employees are responsible for sticking and bleeding a live hog, skinning and eviscerating it, and hanging it from an overhead conveyor, which takes it to a cooler. The killing section includes rendering employees who process inedible parts of the hog. The cutting section includes employees who take the cooled carcass and cut and trim it into saleable parts, and employees ("load-out") who run packaged parts back to the cooler for storage and load them onto trucks for shipping. There are about 1350 production employees.

Maintenance employees are responsible for maintenance and repair of all the machinery, conveyors, and power tools used by the production employees as well as the physical plant (pipes carrying ammonia for the refrigeration system, hot water and steam pipes, and air conditioning). Some maintenance employees are assigned to a particular area, such as the cooler; some make regular rounds of the physical plant; and some are assigned essentially as floaters, working wherever they may be needed. Maintenance also includes janitors and groundskeepers. There are about 115 maintenance employees.

Wages, Hours, and Other Working Conditions

Maintenance employees are classified in an eight-grade pay scale, ranging from \$11.55 to \$15.05 an hour. Maintenance employees have to take classroom training and

pass a test to move from one grade to another (more fully described below in the section on skills). Production employees are paid on a five-grade scale, with ten steps in each grade, ranging from \$9.30 to \$13.05 an hour. There is no evidence on what production employees have to do to move up the scale.

The Employer performs an annual wage review for the entire plant. In 2004, every grade and step was given a 30 cent per hour increase. In 2002, maintenance employees suffered a 25 cent per hour wage cut not shared by production employees. The only bonus program described in the record is for production employees only, based on attendance.

All policies (e.g., vacation, attendance and discipline policies) are the same for all employees, all employees share the same insurance and 401(k) plans, and all employees have the same holidays and other leave rights. Maintenance employees wear gray hard hats. Trainers wear blue hats. Translators wear purple hats. The bulk of the production crews wear white hats. Safety committee members wear red hats. Any employee working around the meat product is required to wear a white smock, provided and laundered by the Employer.

There is only one cafeteria and break room, one parking lot, and one sanctioned building entrance, shared by all employees, managers and supervisors. There are five time clocks scattered throughout the building, and any employee can use any one, but maintenance employees as a matter of practice all use the one by the maintenance office.

All rank-and-file employees are entitled to a 15 minute break in the first half of their shift and a 30 minute lunch period. Anyone can be interrupted and put back to

work during their breaks, although in practice this rarely happens to production employees, and almost never to anyone outside the rendering and load-out departments. Maintenance employees who are interrupted can start their break over when and if they get back to it. There is no evidence of how often this might happen. If they are too busy to take lunch at all, they get an extra 30 minutes worth of pay. The only maintenance employee who testified about this circumstance said it happened to him 44 times in the last two years.

Maintenance employees work around the clock, seven days a week, whether there are hogs to kill and butcher or not. In fact, some preventive maintenance and other work can only be performed conveniently when production employees are not present.

The basic meat cutting operation runs two shifts, weekdays. The standard shifts are the A shift, with start times staggered between 6 and 7:30 a.m. and ending between 2:30 and 4 p.m., and the B shift, from 3 to 4 p.m. until 11:30 p.m. to 1 a.m. Ultimately, the production shifts lasts for kill employees until there are no live hogs in the lot, and for cutting employees until the coolers are emptied of the previous day's kills. During the busy season, fall to early winter, the Employer processes hogs on Saturdays. Employees assigned to rendering and load-out routinely work around the clock and weekends, rendering in three eight-hour shifts, load-out in two twelve-hour shifts per day.

The Employer has one human resources department, and one repository for employee files. Applications for any job are screened by a single manager in the HR

department, but there is no further testimony about the hiring process after that initial screening.

Commonality of Supervision

There is a plant manager at the top of the administrative hierarchy. Second in command appears to be Dan Richardson, operations manager. Richardson directly supervises four production superintendents, one for each of the killing and cutting sections on each of the two production shifts, and one plant engineer, who supervises all of the maintenance employees. There are two further layers of supervision between the production superintendents and the production employees, and between the plant engineer and the maintenance employees.

Employer witnesses testified that production supervisors have authority to direct and discipline maintenance employees. In fact, from about 7 p.m. until 7 a.m., no maintenance supervisors are present in the plant. Employer witnesses described an incident in which a production supervisor initiated the suspension of a maintenance employee for not wearing fall protection equipment while working at elevation in January 2002, and another incident in which a production supervisor applied the Employer's drug and alcohol policy to a maintenance employee.

Maintenance employees get their assignments in either of two ways. Maintenance supervisors write up work orders for preventive and scheduled jobs, and anything else they can anticipate. In addition, maintenance employees can be called to work on a breakdown by production supervisors or even production employees.

Degree of Skill and Common Functions

No evidence was presented concerning the skills or particular duties of the production employees, beyond what may be assumed from their job titles. No maintenance job requires any particular prior experience or training. No maintenance job requires any license, certification, or apprenticeship. All openings throughout the plant are posted for bidding by internal applicants before the Employer hires from the outside.

The only qualifications for maintenance jobs are English proficiency and a minimum score on a test of general mechanical aptitude. The test is a series of drawings, with a question about the mechanical principles illustrated. For example, there may be a series of interconnected gears, and the question is which way is one turning when the spin of another gear down the line is indicated, or there may be a compound pulley with several different size wheels, and the question is which one turns the fastest when you pull the rope.

Some production jobs also require English proficiency, most of them because of substantial reading requirements, for example, for equipment manuals or product orders. This applies to all load-out employees and the rendering department. There is also a scaler job and one butcher who work with the USDA inspector who are required to speak English.

Once an employee qualifies for the starting maintenance rate, he or she moves up the pay scale by taking classroom instruction and taking another test for each grade. There is no evidence concerning the contents of these additional tests. Maintenance employees undergo in-house classroom training, as well as on-the-job training, in

preparation for these tests. Production employees also take classroom instruction on how to drive the forklifts and mules (a mule is a pushing machine that drives like a forklift, but lacks the lift).

Maintenance employees work with the refrigeration system, including ammonia lines. They are required to fix small leaks. No rank-and-file maintenance employee is qualified to fix an ammonia leak serious enough to qualify as a "hazmat" situation. Maintenance employees also work on the plumbing and hot water pipes and the ductwork. They have to be able to break down and reassemble pumps, for example to replace seals. Some do a little welding. They keep the forklifts and mules running. They do regular preventive maintenance on the machinery and regularly change saw blades on the meat cutting equipment. Maintenance employees use a machine shop in which they operate drill presses, grinders, milling machines, lathes, various power saws and shears, sheet metal working tools, and hoisting and pulling tools.

Maintenance employees are never called upon to do any production work. Production employees don't do any maintenance work except in two special circumstances. Once or twice a year, the Employer does a major cleaning job in the coolers. Once a year or less, it has a "showcase" event where corporate visitors or some other outsiders tour the plant. For each of those situations, the Employer recruits production employees on a volunteer basis to help on weekends, and those employees clean and paint or do other simple tasks similar to what the janitorial and grounds keeping employees do on a daily basis.

Production employees never do any machinery maintenance, even on these weekend maintenance assignments. Although their time is billed to a maintenance

code (415, the same code applicable to regular janitors and groundskeepers), production employees engaged in these special jobs are still paid their normal production wage.

Frequency of Contact and Interchange

There is no evidence of temporary interchange, that is, of any production employee substituting for a maintenance employee or vice versa. About twenty of the 115 current maintenance employees started in production jobs. Five production employees reverted there from maintenance jobs, three of them after failing a trial period in maintenance.

Typical contact between maintenance employees and production employees starts with a production employee reporting a problem with his or her equipment. Then the maintenance employee has to ask the production employee question to diagnose the problem. A production employee may carry tools or run for parts, but is not otherwise involved with the repair.

Functional Integration

Maintenance employees are responsible for keeping the lights on and the building comfortable. They are also routinely involved in addressing breakdowns and getting the production lines back up and operating. Maintenance employees have to

keep an eye on the product, for example, to make sure the coolers are chilling the meat to a point conducive to the cutting employees' requirements, as well as freshness.

Conclusions

Primarily based on the lack of skills that distinguish maintenance from production employees,² I find that the maintenance employees do not “constitute a separately identifiable group performing similar functions and having a community of interest separate from production and having a community of interest such as would warrant separate representation.” Any production employee who can speak English is entitled to take the test and then bid on maintenance jobs, and they are preferred over outside applicants. A substantial proportion of the maintenance department has done that. There are no other requirements, no mechanical experience, no education, no apprenticeship or other training required. Once an employee passes the test, they pick up any skills they need to advance up the pay scale in-house and on-the-job.

I recognize that there is little or no temporary interchange or overlap of functions. I also recognize that frequent contact and integration are not sufficient to require this combination. Sundor Brands, Inc., 334 NLRB 755, 757 (2001). On the other hand, wages overlap substantially, and all other terms and conditions of employment are the same for both departments. There is some common supervision, particularly during

² The Petitioner's post-hearing brief cites decisions issued by the Regional Directors in Regions 8 and 17 finding that units limited to production employees were appropriate. In reaching my decision in this case, I have relied on controlling Board law rather than the decisions of other Regional Directors. In any event, I consider all of those decisions distinguishable based on the much higher degree of skill possessed by the maintenance employees in those cases. The Employer's post-hearing brief relies on the fact that certain of its other facilities have combined production and maintenance units. While such evidence may be minimally relevant, I would reach the conclusion that a production-only unit is not appropriate based solely on the record evidence concerning the facility at issue in this case.

substantial periods when no maintenance supervisors are present. And at bottom, I am aware of no case in a manufacturing setting in which the Board has approved separation of production employees from maintenance employees with these skill characteristics. Compare Ore-Ida Foods, 313 NLRB at 1019 (formal apprenticeship required); Capri-Sun, Inc., 330 NLRB 1124, 1124-1125 (2000) (extensive course work and personal tool collection required); Yuengling Brewing Co., 333 NLRB 892, 893 (2001) (at least some maintenance employees required licenses and certifications). Finally, I note that no union seeks to represent the maintenance employees in a separate unit. Accordingly, I conclude that a unit limited to the Employer's production employees is not appropriate and that the appropriate unit must include the maintenance employees. Since the Petitioner indicated at the hearing that it would proceed to an election in the event that I found an overall unit to be appropriate, I will direct an election in a combined production and maintenance unit.³

³ The Petitioner also seeks to exclude the knife room employee and line translators on grounds that they do not share a community of interest with production employees, and to exclude members of the safety committee on grounds of community of interest or supervisory or managerial status. Members of the safety committee are production employees (and sometimes maintenance employees, although none serve at the present) appointed by supervisors to exercise extra vigilance on safety matters. There is no substantial extra training and no benefit for serving on the safety committee. Every employee is responsible for safety. Although safety committee members are distinguished on the production floor by a red hard hat, they spend most of their time on regular production or maintenance work. There is simply no evidence that their notice of safety issues includes any effective recommendation of discipline or any other supervisory or managerial prerogative that would justify excluding them from the unit. The knife room employee is responsible for maintaining the inventory of knives and supplying employees with new or clean knives when they need them. Particularly considering that there is only one such employee, this integral function should be included in the unit. The line translators wear a purple hat so they can be easily found and spend most of their time translating between Spanish speaking employees and supervisors and English speakers. The only grounds suggested for their exclusion is evidence presented by the Union that some employees don't trust the accuracy of their work. I find that an insufficient basis for exclusion. The Union also raised an issue near the close of the hearing concerning orientation trainers, but the parties agreed not to litigate the issue in this proceeding and leave their status to the challenge procedure if necessary.

6. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time hourly production and maintenance employees employed by the Employer at its pork slaughter plant in Storm Lake, Iowa; excluding office clerical employees, management support employees (including supply, electricians, laundry room employees, nurses, quality control employees, yard employees, plant security employees, scale house employees, electronic scale technicians, manifesters, cut floor load manifesters, cut floor manifesters, box clerks, and livestock handlers), foremen, salesmen, professional employees, and guards and supervisors as defined in the Act.

DIRECTION OF ELECTION⁴

An election by secret ballot will be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States may vote if they appear in person at

⁴ Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 - 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by **August 6, 2004**.

the polls. Ineligible to vote are persons who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.⁵

Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **United Food and Commercial Workers Union, Local 440.**

Signed at Minneapolis, Minnesota, this 23rd day of July 2004.

/s/ Ronald M. Sharp

Ronald M. Sharp, Regional Director
Eighteenth Region
National Labor Relations Board
Suite 790
330 South Second Avenue
Minneapolis, MN 55401

⁵ To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. Excelsior Underwear Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969). Accordingly, it is directed that two copies of an election eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. North Macon Health Care Facility, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. In order to be timely filed, this list must be received in the Minneapolis Regional Office, Suite 790, 330 Second Avenue South, Minneapolis, MN 55401-2221, on or before close of business **July 30, 2004**. No extension of time to file this list may be granted by the Regional Director except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.